WP(C) 457/2007
BEFORE
THE HON'BLE MR JUSTICE AMITAVA ROY

JUDGMENT AND ORDER

In challenge is the decision of the Coal India Limited (hereinafter for short as 'CIL') to award the work of transferring coal in the railway wagons from its st ock at Tirap and Tikak railway siding to the respondent No. 6, as contained in t he letters dated 16.01.2007 to the said effect.

2. I have heard Mr. AB Choudhury, Senior Advocate assisted by Mr. H Hoque Advocate for the petitioner, Mr. MZ Ahmed, Senior Advocate for CIL and Mr . PK Goswami, Senior Advocate assisted by Mr. S Sharma, Advocate for respondent No. 6.

3. As the edificial facts and the legal issues, are common, both th ese petitions were heard analogously and are being disposed of by this common or der.

A brief outline of the facts leading to the instant proceedings needs to be sket ched for better comprehension of the rival contentions. The petitioner, a regis tered partnership firm, claims to be engaged in transfer of coal into railway wa gons under the CIL for 18 years and had been settled with the same work for the term 2003-2004. The North Eastern Coal Fields, Coal India Limited, Margarita is sued NIT dated 25.09.2002, inviting tenders for the work transfer of coal into railway wagons from stock stacked at railway siding at different location in loo se condition . The locations were identified as Tirap and Tikak siding. While the period of works was 24 months, the estimated value of the work corresponding to the two aforesaid sidings was Rs. 2,25,00,000/- each. Approximate quantity of coal to be transferred was mentioned to be 5,00,000/- metric ton each year. The petitioner and the respondent No. 6 along with others submitted their tender s for the work related to Tikak and Tirap siding. The rates quoted by the petit ioner and respondent No. 6, were as hereunder:

M/s. Associate Enterprise (Petitioner) Rs. 17.45 per ton
Respondent No. 6 Rs. 13.50 per ton

While contending that in rate below Rs. 17.45 was unworkable, the petitioner has asserted that the respondent No. 6, has no experience in the business of transf er of coal into railway wagons, he not having undertaken such or similar work at any point of time. According to the petitioner, therefore, in face of Clause 3 .2 (C) of the Instructions to Bidders (hereafter also referred to as the 'ITB'), he was ineligible to be considered. On the other hand, having regard to its pa st experience in executing such works and its financial soundness, it was the mo st suitable tenderer. The above notwithstanding, the General Manager, North Eas tern Coal Fields (Coal India Ltd.), District Tinsukia, by the impugned communi cation dated 16.01.2007, intimated the respondent No. 6 that his bid had been ac cepted for the works upto 30.04.2007, pending a final decision to award the same in whole for the stipulated period mentioned in the NIT. The decision has been impugned to be illegal and arbitrary being prompted by extraneous consideration s. Private negotiation with the respondent No. 6, to the exclusion of the petit ioner and other tenderers has also been alleged. The respondent No. 6, had ente red through a caveat. The learned counsel for the CIL has produced the records to endorse the decision assailed.

4. Mr. Choudhury, has assertively urged that the respondent No. 6 b eing deficient in experience, in the touchstone of Clause 3.2 (b) of the ITB, he was disqualified to be considered for the settlement. As he does not possess a ny experience whatsoever, in the work of loading of coal into railway wagons, hi s selection has been in departure from the aforementioned clause of the ITB. According to the learned Senior counsel, the temporary nature of the settl ement as conveyed by the impugned communication is a clear index of the want of confidence of the respondent authorities in him. The arrangement sought to be r

esorted to, was yield of a private negotiation with him, he urged. No such conditional award of the work being comprehensible in the NIT, the impugned decision being opposed thereto, is non est in law. The acceptance of the respondent's tender not being absolute and unqualified in terms of the section 7 of the Contract Act, 1872 as well, the impugned settlement is null and void. Mr. Choudhury, stood by the pleaded assertions of mala fide and extraneous considerations. To buttress his arguments, he placed reliance on the decision of the Apex Court in AIR 1979 SC 1628, (RAMANA DAYARAM SHETTY Vs. THE INTERNATIONAL AIRPORT AUTHORITY OF INDIA & ORS.) and of this Court in 2002 (3) GLT 463 (S.K. RAI (M/S.) Vs. UNION OF INDIA & ORS.) and 2002 (3) GLT 653 (D.S. TRADING (M/S.) Vs. PADUM GOGOI & ORS.)

5. In reply Mr. Ahmed, maintained that the respondent No. 6's tenders having been found to be responsive to the tender stipulations and rate the lowest yet workable, he was rightly awarded the contract. Referring to the records, he contended that as the tenderers noticeably had reduced their rates compared to those of the previous year, the initial work term has been limited to 30th of April, 2007.

6. Mr. Goswami, while endorsing the above, argued with reference to Clause 3.2 (b) and (c) together with 3.3 and the Forms Of Bid And Qualification Information that the intending tenderer to be eligible was not required to be experienced in the execution of the work of transferring coal exclusively and that accomplishment of works of transferring any material in loose condition into wagons, was sufficient. The work in essence being to handle the labour force for and organized transition of the material lying in loose condition from the siding to the railway wagons, the respondent No. 6, A Class 1 contractor, being adapted to such jobs, evidently satisfied the requirement of experience as conceived of in the NIT. Besides, the respondent No. 6, being admittedly the lowest tenderer and the impugned decision apparently being preceded by cost price analysis, as visualized in Clause 26 of the ITB, the challenge thereto, is clearly untenable. The limited duration of the initial settlement presumably being to test the efficiency of the respondent No. 6, a new entrant in the arena was logical and did not militate against the validity of his selection, he urged.

7. I have extended due consideration to the rival assertions. The fundamental essentialities to inform a valid administrative decision in the matters of distribution of State larges, have been authoritatively propounded by the Apex Court in RAMANA DAYARAM SHETTY (Supra). It ruled that an executive authority must be rigorously held to the standards by which it professes its action to be judged and any deviation therefrom, would be at the pain of invalidation thereof. While, underlining that such an imperative would act as a check against an exercise of arbitrary power by the executive authority, it emphasised that a governmental action in such matters has to be in accord with the pristine tenet of fairness enshrined in Article 14 of the Constitution of India.

8. This Court in S.K. RAI (M/S.) (Supra), disapproved the approach of the respondent authority therein in relaxing the essential norms and awarding the contract to the Respondent No. 6, solely on the consideration that its quoted rate was the lowest. The facts in D.S. TRADING (M/S.) (Supra), reveal that the expert committee and the settling authority therein, had entertained defective tenders to the exclusion of the valid ones. The decision making process was, therefore, interfered with being vitiated by arbitrariness and lack of transparency.

9. Before evaluating the competing arguments, it is incumbent to elicit the true purport of the Clauses in the tender notice relied upon by the parties. It is apparent from the tender documents that a tenderer was required to submit his paper in sealed covers in two parts i.e. Part I and Part II. Whereas, Part I related to the technical bid, Part II concerned the price bid.

The CIL, reserved to itself the discretion not to accept the lowest tender and the right to reject any or all the tenders without assigning any reason and further to distribute the work and allot the work to more than one tenderer. Clause 1.2 of the ITB, mentioned that the successful bidder could expect to be assigned the work for the period specified in the tender document. No commitment as such, therefore, is decipherable to award the works to the successful bidder for the entire term. The two heads on which informations and documents were required to be furnished by the bidders and relied upon by the petitioner deserve to be extracted :

3.2 If the employer has not undertaken pre-qualification of potential bidders, all bidders shall include the following information and documents with their bids (copies of all documentary evidences are to be duly authenticated by the tenderers/constituted attorney of the tenderer with full signature and seal. All signed declarations are to be made in the tenderer's letterhead).

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b. Experience of having successfully executed similar works during last seven years.

c. Experience in works of similar nature and size for each of the last five years, and details of work under way or contractually committed; and the name and address of clients who may be contacted for further information on those contracts.

A tenderer to qualify for the award of the contract, was required under Clause 3.3 of the ITB to have experience of successful execution of works of similar nature valued 65% of the annualized value of the work put to tender in any year during last 7 (seven) years ending last day of the month previous to the one in which bid applications were invited. The word executed works of similar nature , have been illustrated to be transfer of any material in loose condition into wagons. Clause 26 stipulated the requirement of evaluation and comparison of the bids determined to be substantially responsive to the tender conditions. The procedure, therefor, was also laid down therein. Under Cause 26.4, the CIL was empowered to require the bidder to produce total price analysis for any or all items of the Bill of Quantities, to demonstrate the internal consistency of those prices with the methods and schedule proposed, if his bid appeared to be seriously unbalanced in relation to the Engineer's estimate of the cost of the work to be performed. The power to accept, negotiate or reject a bid, as well as to cancel the bidding process at any time prior to the award of the contract was clearly reserved to the CIL.

10. The tenderers were required to submit their bids in the forms prescribed both for Part I and Part II. In clause 1.4 of the form for Part I, a proforma was provided to furnish the relevant informations pertaining to experience in execution of work of similar nature in the last 7 (seven) years. Sl. No. 9 of the said proforma indicated the commodities. It appears therefrom that the CIL recognized for the purpose of experience of a prospective bidder, the work of transportation of sand, OB/Matti/Middling/Washery rejects etc., besides coal for the purpose of the tender process.

11. A perusal of the tender submitted by the respondent No. 6 along with the documents supportive of his experience in execution of similar nature of works, disclose that he had been allotted the work of loading and carriage of materials manually and construction for Improvement of Riding Quality Programme from Km 651/0 to 671/0 of NH under Dibrugarh Division, Dibrugarh on 13.12.2002 under the Chief Engineer, Public Works Department, NH Works Assam. The value of the work was Rs. 5,38,91,977/-, which he completed on 12.07.2003. In course of the said work boulders, broken stone, sand gravel were transported.
In addition thereto, he was also allotted an identical work under the said project on 01.03.2006, the value whereof, was Rs. 5,25,07,103/-, which he completed i

n December, 2006. Certificates of satisfactory completion of the aforementioned works, were also submitted by him along with his tender.

12. A cumulative reading of the tender conditions noted hereinabove, proclaims that the essential condition of eligibility for a bidder to qualify for the work tender, vis- -vis experience, was the requirement of successful execution of works of similar nature i.e. transfer of any material in loose condition into railway wagons, value whereof, ought to be 65% of the annualized value of the work tendered in any year during last 7 (seven) years ending on the last day of the month previous to one in which the bid applications were invited. This view is reinforced by the prescribed Form Of Bidding And Qualification Information for Part I, whereunder, the essential informations to the above effect, were to be furnished in the proforma under Clause 1.4 thereof. It further transpires that the experience of a prospective tenderer in transportation work involving articles other than coal, namely, sand, OB/Matti/Middling/Washery rejects etc. was cognizable. The tender submitted by the respondent No. 6, in the above premise, therefore, does not appear to be non-responsive to the criteria of experience as stipulated in the aforementioned clauses of the ITB.

13. The records reveal that the Tender Committee constituted for the purpose, in its initial evaluation between 14th to 18th November, 2006 of the tenders detected deficiencies therein, vis- -vis the petitioner, the respondent No. 6 and some others. Accordingly, all the tenderers were requested to submit the requisite documents by 07.12.2006. Having found the technical bid of the tenderers responsive, the price bids were opened. The respondent No. 6, was found to have quoted the lowest rate of Rs. 13.50 per ton for both the sidings. Whereas, M/s. North East Enterprise quoted a rate of 14.45 per ton, the petitioner's offer was Rs. 17.85 per ton. The Tender Committee assessed the respondent No. 6 to be the lowest tenderer for both the sidings. It was of the view that the respondent No. 6, also fulfilled the eligibility criteria and thus recommended acceptance of his rate for awarding the works to him. The proposal was accepted on principle and thereafter, the respondent No. 6 was required to submit the total breakup of his rate, which he accordingly did. His rate was further tested on various other norms including minimum wages of unskilled work in Assam and minimum workload of 6 to 7 metric ton per head per shift of 8 hours and was appraised to be reasonable and workable as per the analysis furnished by him. Having regard to the value of the work, the issue was ultimately placed with the Chairman North Eastern Coal Fields, who on 15.01.2007, accorded his final approval. While, taking the decision, the said authority noticing the drop in the rates quoted by the bidders as a whole considered it appropriate to watch the performance of the awardee for a period of 3 months and, therefore, limited the period for the present to be upto 30.04.2007 to be extended for the full term based on a review.

14. On a threadbare scrutiny of the records, no semblance of extraneous consideration or unholy alliance, as alleged could be discerned. As referred to hereinabove, documents evidencing the experience of respondent No. 6, as stipulated in the ITB and in the prescribed form in Part I of the tender documents are available. The Tender Committee and other authorities at different levels appeared to have been convinced that the respondent No. 6, was competent to execute the works and has the derived experience. Further, the rate quoted by him was the lowest. These factors cannot be dismissed as irrelevant. The rate quoted by the respondent No. 6, as the records disclose, had been analyzed and tested at different stages and levels. The decision to award the work has been at his quoted rate. The opportunity granted to him to furnish the components constituting his rate cannot be construed as a private negotiation with him, the recommendation of the Tender Committee in his favour, in the meantime, having been accepted on principle. The limited term initially granted to him, in the above facts and circumstances, principally to watch his performance, is not mutilative of his assessed suitability. As a matter of fact, the records do not disclose any

doubt or reservation with regard to his competence. The respondent No. 6, having been selected to administer the works, in my view, the decision to limit the period of the term in praesenti cannot invalidate the process leading thereto.

15. The judicially evolved norms, as enunciated in the authorities cited at the Bar, are no assistance to the petitioner in the attending facts. As it is some leeway has to be conceded to the administrative authorities in taking decisions on such issues, however, within the permissible limits. The authorities concerned are the best assessors of their requirements and services proffered. No contravention of any essential precept governing the distribution of State largesse is perceptible. The apprehension of inflation of rates later in the process of execution of the works appears to be hypothetical. The condition of review of performance of the respondent No. 6, adequately takes care of that aspect as well. The decision making process, does not appear to be afflicted by any error of law or procedure or any non-germane consideration. Having regard to the constricted scope of judicial review in the face of the materials available on records, the challenge thus cannot be upheld. The petitions being devoid of merit fails. No costs.